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Paper No. 6

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PATENT OPERATION  
TWO INDEPENDENCE WAY, P.O. BOX 5312  
PRINCETON NJ 08543-5312

In re Application of  
Maurice  
Application No. 09/520,197  
Deposited: February 25, 2000  
Attorney Docket No. RCA 88441A

**COPY MAILED**

JUL 25 2002

**OFFICE OF PETITIONS**

DECISION DISMISSING  
PETITION

This is a decision on the petition filed February 8, 2002, requesting that the above-identified application be accorded a filing date of February 25, 2000. In addition, a petition to revive under 37 CFR 1.137(b), filed January 16, 2002, will be addressed.

The petition to accord a February 25, 2000 filing date is dismissed.

The petition to revive under 37 CFR 1.137(b) is dismissed as moot.

Any request for reconsideration of this decision must be submitted within TWO (2) MONTHS from the mail date of this decision. Extensions of time under 37 CFR 1.136(a) are permitted.

The application was deposited on February 25, 2000. However, on May 17, 2000, the Office of Initial Patent Examination mailed a Notice of Incomplete Nonprovisional Application (Notice) requiring a specification, at least one claim, and a newly executed oath or declaration covering the items.<sup>1</sup> The Notice stated that the filing date would be the date of receipt of the required items.

On February 8, 2002, the present petition was filed. Petitioner argues incorporation by reference.

A review of the application file confirms that the transmittal letter deposited on February 25, 2000 incorporated by reference the entire disclosure of prior application No. 08/737,192. The entire disclosure, including specification, claims and drawings of application No. 08/737,192 was specifically incorporated by reference in the present application on February 25, 2000.

A petition under 37 CFR 1.182 and the required petition fee, including an amendment submitting the necessary omitted material (the specification, claims and drawings), requesting that the necessary omitted material contained in the prior application and submitted in the

<sup>1</sup> The Notice does not require drawings because it is impossible to ascertain whether a drawing is necessary if no specification is present.

amendment, be included in the continuation or divisional application based upon the incorporation by reference statement, is required in order to accord the application a filing date as of the date of deposit of the continuation or divisional application. An amendment submitting the omitted material and relying upon the incorporation by reference will not be entered in the continuation or divisional application unless a decision granting the petition states that the application is accorded a filing date and that the amendment will be entered.

Unfortunately, the application file does not contain a copy of the specification, claims and drawings filed in application No. 08/737,192. Therefore, no filing date can be accorded at present time.

It is noted that the petition under 37 CFR 1.182, filed February 8, 2002, states that a copy of the prior specification , claims and drawings of the parent application are enclosed. The Office has no record of receiving these items.

In addition, the date typed at the bottom of the second page of the petition is June 29, 2000. Petitioner has not presented a certificate of mailing in compliance with 37 CFR 1.8 or an itemized date stamped post card receipt to enable the Office to accord June 29, 2000 as the filing date of the petition under 37 CFR 1.182. This means that the Office has no record of any prosecution activity on petitioner's part from February 25, 2000 until January 16, 2002. Proceedings in this case were officially terminated on January 7, 2002.

As petitioner is aware, an applicant's diligence in prosecuting an application is critical in ascertaining the scope of equitable relief when it is sought. Equitable powers should not be invoked to excuse the performance of a condition by a party that has not acted with reasonable, due care and diligence. U.S. v. Lockheed Petroleum Services, 709 F.2d 1472, 1475 (Fed. Cir. 1983). Petitioner is encouraged to provide evidence of diligence in responding to the May 17, 2000 Notice in order to avoid the possible imposition of a terminal disclaimer.

Regarding the petition to revive under 37 CFR 1.137(b), it is dismissed as moot because it is not possible to revive an application that has never been accorded a filing date. No petition fee under 37 CFR 1.137(b) has been or will be charged to petitioner's deposit account for this matter.

Pursuant to petitioner's authorization, deposit account no. 07-0832 will be charged the \$130.00 petition fee for filing a petition under 37 CFR 1.182.

Further correspondence with respect to this matter should be addressed as follows:

By mail:                   Commissioner for Patents  
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Any inquiries pertaining to this matter may be directed to Petitions Attorney E. Shirene Willis at (703) 308-6712.

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